The Obviousness of Anarchy: The Creation of Rules Of Law - The Art of Not Being Governed

Continued from **The Obviousness of Anarchy: The Question**

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IV. The Answer

A. Rules of Law

1. CREATION

Supporters of government claim that government is necessary to provide the fundamental rules that bring order to human life in society. Without government to create rules of law, they contend, human beings are unable to banish violence and coordinate their actions sufficiently to produce a peaceful and prosperous society, and hence, are doomed to a Hobbesian existence that is “solitary, poor, nasty, brutish, and short.” 3

The proper response to this is: look around. Those of us residing in the United States or any of the British Commonwealth countries live under an extremely sophisticated and subtle scheme of rules, very few of which were created by government. Since almost none of the rules that bring peace and order to our existence were created by government, little argument should be required to establish that government is not necessary to create such rules. On the contrary, it is precisely the rules that were created by government that tend to undermine peace and order.

rules not rulers

The Anglo-American legal system is often referred to as a common law legal system. This is unfortunate, given the anachronistic contemporary understanding of the term “common law.” Currently, common law is associated with “judge-made” law. For most of the formative period of the common law, however, judges did not make the law, but merely presided over proceedings where disputes were resolved according to the accepted principles of customary law. Hence, describing the English common law as judge-made law is akin to describing the market as something created by economists.

English common law is, in fact, case-generated law; that is, law that spontaneously evolves from the settlement of actual disputes. Almost all of the law that provides the infrastructure of our contemporary society was created in this way. Tort law, which provides protection against personal injury; property law, which demarcates property rights; contract law, which provides the grounding for exchange; commercial law, which facilitates complex business transactions; and even criminal law, which punishes harmful behavior, all arose through this evolutionary process. It is true that most of our current law exists in the form of statutes. This is because much of the common law has been codified through legislation. But the fact that politicians recognized the wisdom of the common law by enacting it into statutes, hardly proves that government is necessary to create rules of law. Indeed, it proves precisely the opposite.

English law provides a nice illustration of how law evolves when not preempted by government. When people live together in society, disputes inevitably arise. There are only two ways to resolve these disputes;

violently or peacefully. Because violence has high costs and produces unpredictable results, human beings naturally seek peaceful alternatives. The most obvious such alternative is negotiation. Hence, in Anglo-Saxon times, the practice arose of holding violent self-redress in abeyance while attempts were made to reach a negotiated settlement. This was done by bringing the dispute before the communal public assembly, the moot, whose members, much like present-day mediators, attempted to facilitate an accommodation that the opposing parties found acceptable. When reached, such accommodations resolved the dispute in a way that preserved the peace of the community.

The virtue of settling disputes in this way was that the moot had an institutional memory. When parties brought a dispute before the moot that was similar to ones that had been resolved in the past, someone would remember the previous efforts at settlement.

Accommodations that had failed in the past would not be repeated; those that had succeeded would be. Because the moot was a public forum, the repetition of successful methods of composing disputes gave rise to expectations in the community as to what the moot would recommend in the future, which in turn gave the members of the community advance notice of how they must behave. As the members of the community conformed their behavior to these expectations and took them into consideration in the process of negotiating subsequent accommodations, rules of behavior gradually evolved.

This, in turn, allowed for the transformation of the dispute settlement procedure from one dominated by negotiation to one consisting primarily in the application of rules. The repetition of this process over time eventually produced an extensive body of customary law that forms the basis of English common law.4

It is true that, beginning in the late twelfth century, the common law developed in the royal courts, but this does not imply that either the king or his judges made the law. On the contrary, for most of its history, the common law was entirely procedural in nature. Almost all of the issues of concern to the lawyers and judges of the king's courts related to matters of jurisdiction or pleading; that is, whether the matter was properly before the court, and if it was, whether the issues to be submitted to the jury were properly specified. The rules that were applied were supplied by the customary law. As Harold Berman explains,

> [T]he common law of England is usually said to be itself a customary law. . . .What is meant, no doubt, is that the royal enactments established procedures in the royal courts for the enforcement of rules and principles and standards and concepts that took their meaning from custom and usage. The rules and principles and standards and concepts to be enforced . . . were derived from informal, unwritten, unenacted norms and patterns of behavior.5

Thus, as late as 1765, Blackstone identified the common law with "general customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification." 6 Indeed, modern commercial law is derived almost entirely from the customary law merchant that Lord Mansfield engrafted onto the common law wholesale in the eighteenth century.7

The interesting thing about the common law process is that it creates law only where it is actually needed to allow human beings to live together peacefully. Consider the torts of assault and battery. Battery forbids one from intentionally making "harmful or offensive contact" with another. This prohibits not only direct blows, but snatching a plate out of someone's hand or blowing smoke in his or her face. Assault forbids one from intentionally causing another to fear he or she is about to be battered, but it does not prohibit attempts at battery of which the victim is unaware or threats to batter someone in the future. These torts protect individuals against not only physically harmful contact, but against all offensive physical contact as well as the fear that such contact will be immediately forthcoming.

When I teach Torts, I ask the students to account for these rules. Being products of the legislative age, they

inevitably launch into some theory of justice or moral desert or human rights, which invariably fails to account for the contours of the law. After all, attempting to batter someone is morally blameworthy whether or not the intended victim is aware of it, and one hardly has the right not to be offended.

The students fail because they think of the law as created by conscious human agency to serve an intended end. Thus, they miss the simpler evolutionary explanation. In earlier centuries, one of the most urgent social needs was to reduce the level of violence in society. This meant discouraging people from taking the kind of actions that were likely to provoke an immediate violent response. Quite naturally, then, when disputes arising out of violent clashes were settled, the resolutions tended to penalize those who had taken such actions. But what type of actions are these? Direct physical attacks on one's person are obviously included. But affronts to one's dignity or other attacks on one's honor are equally if not more likely to provoke violence. Hence, the law of battery evolved to forbid not merely harmful contacts, but offensive ones as well.

Furthermore, an attack that failed was just as likely to provoke violence as one that succeeded, and thus gave rise to liability. But if the intended victim was not aware of the attack, it could not provoke a violent response, and if the threat was not immediate, the threatened party had time to escape, enlist the aid of others, or otherwise respond in a nonviolent manner. Hence, the law of assault evolved to forbid only threats of immediate battery of which the target was aware.

This example shows how the common law creates the rules necessary for a peaceful society with minimal infringement upon individual freedom. Law that arises from the settlement of actual conflicts, settles conflicts. It does not create a mechanism for social control. Common law is law that is created by non-political forces. As such, it can give us rules that establish property rights, ground the power to make contracts, and create the duty to exercise reasonable care not to injure our fellows, but not those that impose a state religion, segregate races, prohibit consensual sexual activity, or force people to sell their homes to developers. Only government legislation, which is law that is consciously created by whatever constitutes the politically dominant interest, can give us rules that restrict the freedom of some to advance the interests or personal beliefs of others.

The unenacted common law provides us with rules that facilitate peace and cooperative activities. Government legislation provides us with rules that facilitate the exploitation of the politically powerless by the politically dominant. The former bring order to society; the latter tend to produce strife. Hence, not only is government not necessary to create the basic rules of social order, it is precisely the rules that the government does create that tend to undermine that order.

To be continued in **The Obviousness of Anarchy: Uniformity of Rules of Law**

Footnotes

3 T. HOBBES, LEVIATHAN 107 (H. Schneider ed., 1958) (1651).
4 For a fuller account of this process, see John Hasnas, Toward a Theory of Empirical Natural Rights, 22 SOCIA L PHILOSOPHY AND POLICY 111 (2005) and John Hasnas, Hayek, the Common Law, and Fluid Drive, 1 NEW YORK UNIVERSITY JOURNAL OF LAW & LIBERTY 79 (2005). See also ARTHUR R. HOGUE, ORIGINS OF THE COM M ON LAW, ch.8 (1966).
5 HAROLD BERM AN, LAW AND REVOLUTION 81 (1983).
6 1 WILLIAM BLACKSTONE, COM M ENTARIES ON THE LAW S OF ENGLAND 67 (1765). See also FREDERICK POLLOCK, FIR ST BOOK OF JURISPRUDENCE 254 (6th ed. 1929) ("[T]he common law is a customary law if, in the course of about six centuries, the undoubting belief and uniform language of everybody who had occasion to consider the matter were able to make it so.").

7 See LEON E. TRAKM AN, THE LAW MERCHANT: THE EVOLUTION OF COM M ERCIA L LAW 27 (1983). The story of the evolution of modern commercial law from the customary law merchant is an often told tale. In addition to Trakman's account, see also HAROLD BERM AN, LAW AND REVOLUTION ch.11 (1983), BRUCE BENSON, THE ENTERPRISE OF LAW 30-35 (1990), and John Hasnas, Toward a Theory of Empirical Natural Rights, 22 SOCIA L PHILOSOPHY AND POLICY 111, 130-31 (2005). For a useful account of the customary nature of the English common law see, Todd Zywicki, The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis, 97 NW. U. L. REV. 1551 (2003). See also J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 2-74 (4th ed. 2002) and John Hasnas, Hayek, Common Law, and Fluid Drive, 1 N.Y.U. JOURNAL OF LAW & LIBERTY 79 (2005).

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